SUPREME COURT, U. S.

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No. 1270

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

DAGES I. BOYLE, *Appellant*

v.

UNITED STATES OF AMERICA, FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON

On Appeal From the United States District Court for the Eastern District of Kentucky

BRIEF FOR APPELLANT DAGES I. BOYLE IN OPPOSITION TO MOTIONS TO AFFIRM

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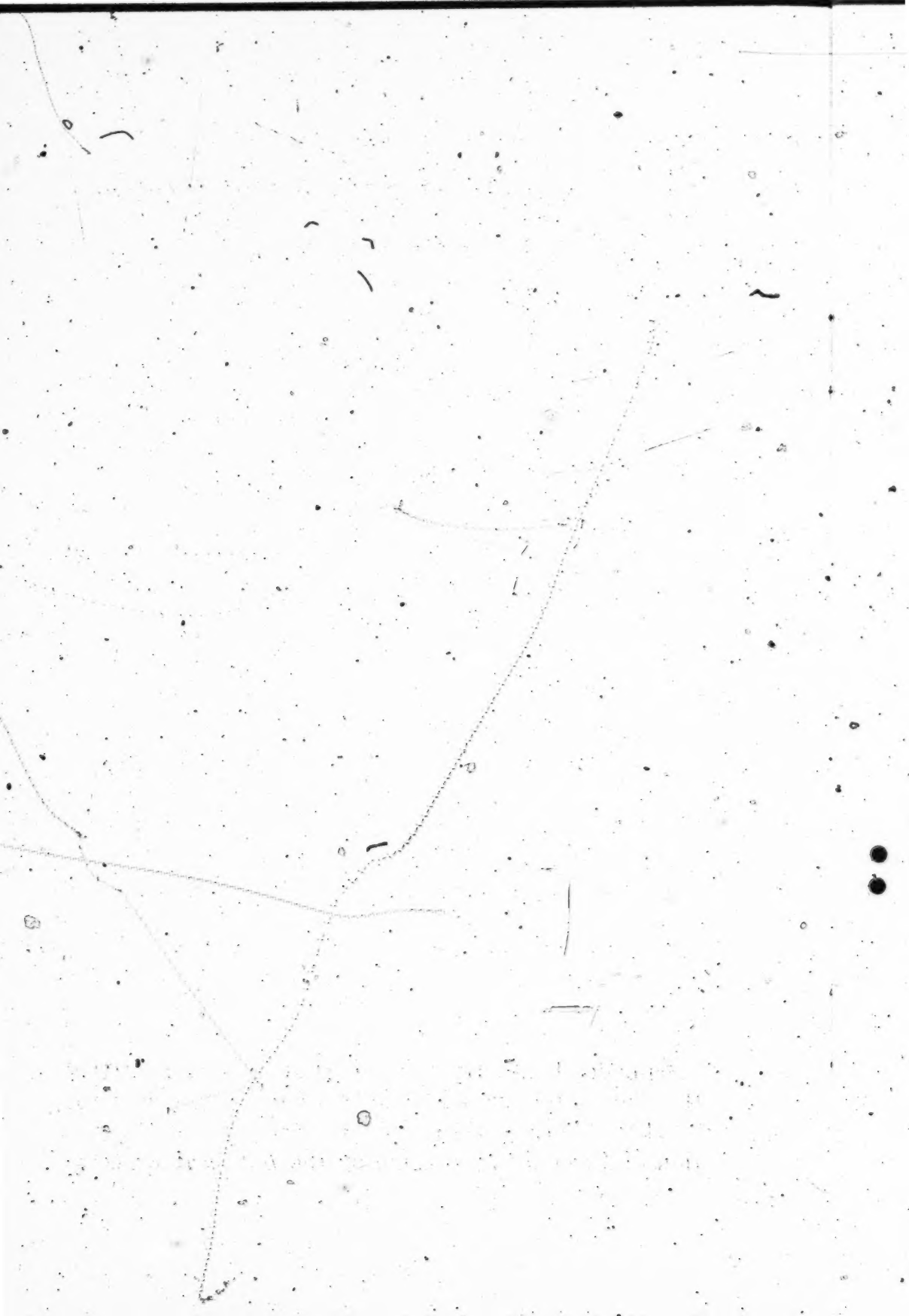

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SEPARATION OF POWERS

Appellee banks try to support their argument that the Bank Merger Act of 1966 (sometimes called the "Act") "Does Not Violate The Principle of Separation of Powers" by construing the Act as if it recog-

nized the validity and integrity of the final court judgments holding that the Lexington consolidation violated Section 1 of the Sherman Act, but forgave the violation. Congress did not so write this Act.[1] The banks seek to rewrite the Act because they seem to concede that the Act construed in accordance with its clear, unambiguous, literal language is unconstitutional.

The Act does not employ the words "forgiveness" or "immunization" or any similar words. It conclusively presumes (adjudicates) that the consolidation did *not* violate section 1 of the Sherman Act *despite the holding of this Court to the contrary.* This language was *deliberately* chosen by Cogress.

The Act usurps (1) the exclusive judicial power to determine whether a statute has been violated, and (2) the exclusive power of the courts to vacate on proper grounds final court judgments.

Even if the statute had attempted to forgive violations of Section 1 of the Sherman Act by vacating final judgments, it would clearly be unconstitutional. See cases cited at pages 17-22 of Boyle's Jurisdictional Statement. As shown by some of the foregoing authorities a final judgment convicting a citizen of a crime cannot be affected by subsequent legislation forgiving the *public* offense. *A fortiori,* the final judgment of this Court and the final judgment of the district court fixing valuable private rights and public rights cannot be vacated by the Bank Merger Act of 1966.

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[1] The rules of statutory construction require that unambiguous language be given full force and effect. See 50 Am. Jur. § 225, page 204.

The *Wheeling Bridge*[2] case has already been distinguished from this case on several grounds. It will not be further discussed herein, except to point out that the banks' analysis of that case fails to recognize the significant fact that the new statute in that case repealed by implication the earlier statute which was the *sole* reason for the provision of the judgment that *prohibited* "defendants against any reconstruction or continuance" of the bridge; whereas, the Act did not repeal section 1 of the Sherman Act which was the sole reason for the divestiture requirement of the final judgment in this case. Congress simply performed the judicial functions of adjudicating (a) that Section 1 of the *unrepealed* Sherman Act was not violated and (b) that the final judgment of this Court and the final judgment of the district court be vacated.

The contention of the bank that Congress can vacate an *unexecuted* final judgment (which Section 2(a) of the Act attempts to do) is completely refuted by cases cited at pp. 18-20 of Boyle's jurisdictional statement.

Boyle would not concede, as the banks state he would, that the hypothetical statute mentioned in the footnote at page 20 of their Motion, would be valid. Such statute would be unconstitutional, but there is no reason to pursue that irrelevant question.

DEPRIVATION OF VESTED RIGHTS

The banks state that Boyle contends that Congress "by enacting 'forgiveness' legislation" unconstitutionally divested private rights.[3] Boyle has always con-

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[2] *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (19 How.) 421.

[3] The "foregiveness legislation" theory is an afterthought. See Boyle's Jurisdictional Statement, p. 13; Doc. 235, p. 2.

tended that the Act clearly states that the consolidation did *not* violate Section 1 of the Sherman Act. He has never contended that the Act "forgives" the violation of that Section found by this Court.[3] Furthermore, if the Act were rewritten so that it could be appropriately described as "forgiveness legislation," such Act would nevertheless unconstitutionally (1) usurp exclusive judicial powers; (2) impair vested private rights; and (3) arbitrarily discriminate between insured banks and others. In short, the statute would be unconstitutional if rewritten as suggested by the banks, but this is an irrelevant academic question.

The banks allege that Boyle construes the "Order of March 18, 1965" as directing "that all former stockholders be returned to their original position in each bank." *Boyle has never made any such absurd construction of that Order.*[4] Some of the "former stockholders" have sold their stock, and some of them are deceased. Obviously, they cannot be restored to their "original positions" because there have been changes in depositors, assets, directors, etc. However, that order (as clarified by the Order of April 29, 1965) fixed in great detail the rights of stockholders, including Boyle, and the rights of the two original constituent banks which were required to be re-established as

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[3] Boyle also contends that the fact that the Act adjudicates that various transactions "involving an insured bank" prior to June 17, 1963 did not violate certain unrepealed antitrust laws preempts the exclusive power of the judiciary to adjudicate whether those statutes were violated and, as a result, the Act is unconstitutional in its entirety. See Boyle's Jurisdictional Statement, pp. 22, 23, 27.

[4] Boyle's construction of the "Order of March 18, 1965" is at pp. 11, 12, 23 and 24 of his jurisdictional statement. Furthermore, the Order speaks for itself as to the private rights established by it.

separate corporate entities. Boyle's right to ownership of stock in each of these banks is recognized and described by the banks themselves as "[h]is relative equity in the two banks after execution of the decree" (footnote page 20, appellee banks' Motion). This is one of the private property rights fixed by the final court judgment which the Bank Merger Act of 1966 unconstitutionally attempts to destroy by vacating that judgment.

Boyle intervened to enforce and protect private rights vested by that judgment, and the banks did not by answer deny a single allegation of his intervening petition. Boyle's intervention to protect private rights under a final judgment does not set any precedent as to the rights of stockholders or others to intervene in antitrust actions prior to final judgment.

BOYLE'S STANDING TO SUE

Boyle, whose private rights would be destroyed by the Bank Merger Act of 1966, is entitled to attack the constitutionality of the Act in its entirety as a means of protecting his rights.[5] See 16 Am. Jur. 2d § 119, page 310. Furthermore, Boyle also intervened on behalf of the two appellee insured banks and is entitled to attack the constitutionality of the Act as it affects the rights of such banks.

THE DISTRICT COURT HAD NO JURISDICTION TO ENTER THE CONSENT JUDGMENT

The above point, which is urged at pages 28-29 of Boyle's Jurisdictional Statement, is so sound that the appellees have ignored it rather than attempt to respond to it.

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[5] Significantly, the existence of arbitrary discrimination is not denied.

CONCLUSION

For all of the foregoing reasons and those set forth in the Jurisdictional Statement, this Court should note probable jurisdiction. Unless this Court takes jurisdiction, the opinion of the district court will set a dangerous and incorrect precedent of tremendous national importance.

Respectfully submitted,

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